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No. 84-76

IN THE

Supreme Court Of The United States

October Term, 1984

NELL HUNTER, et al, individually, and on behalf of all other members of Boards of Registrars in the State of Alabama,
Appellants,

vs.

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE APPELLEES

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QUESTION PRESENTED

Did the Court of Appeals err in holding that Section 182 of the 1901 Alabama Constitution was enacted with a racially discriminatory purpose and continues to have a racially discriminatory effect?

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BRIEF OF THE APPELLEES

CONSTITUTIONAL PROVISION

Constitution of Alabama, 1901

Section 182. The following persons shall be disqualified both from registering, and from voting, namely:

All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property

or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.

STATEMENT OF THE CASE

The end of Reconstruction opened the way for "the white citizens of Alabama *** to reassert their once unquestioned political supremacy. The 1890's ushered in an era of disfranchisement not only in Alabama but throughout the South." Opinion of the Court of Appeals, J.S. A-8. With the rise of populism in the 1890s the black vote had acquired added leverage. *Id.* "[T]he blacks became the block of votes that would decide which party's candidates got elected." Brief of Appellants, 14. The court of appeals, in part relying upon the decision of *United States v. Alabama,* 252 F.Supp. 95, 98 (M.D. Ala. 1966) (three-judge court), found that "[w]hites, Democrats and Populists alike, vied for black ballots in any way they could, with favors, pardons of convictions, outright vote purchase and massive electoral fraud." Both courts below agreed that the turn of the century conventions were spurred on by a concern of federal intervention, J.S. A-8, E-3, especially by the narrow defeat of the Lodge force bill in the United States Senate in 1890, which called for tighter federal control of all phases of voting, from registration to ballot tabulation. The most effective way to avoid federal intervention while accomplishing

their goals, the reformers believed, was to eliminate the Negro vote. According to the court of appeals (J.S. A-9):

> In the words of one delegate to the 1901 convention, "Now we are not begging for 'ballot reform' or anything of that sort, but we want to be relieved of purchasing the Negroes to carry elections. I want cheaper votes." ***
>
> When the Alabama Constitutional convention assembled in May 1901, the question was not whether to disfranchise the Negro but rather how to do so constitutionally. In his opening address John B. Knox, the president of the convention, declared:
>
> > And what is it that we want to do? Why it is[,] within the limits imposed by the Federal Constitution, to establish white supremacy in this State.
>
> I *Official Proceedings* [*of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901*] at 8; . . . In Knox' words, "if we would have white supremacy, we must establish it by law—not by force or fraud." I *Official Proceedings* at 9.

The court of appeals found that the Convention's suffrage committee, borrowing from the successful methods of the Second Mississippi Plan and those of other Southern states, sought to achieve the convention's objective "by setting on devices that would subvert the guarantees of the fourteenth amendment without directly provoking a legal challenge." J.S. A-9. Multiple devices were adopted because of a concern that one or more of the methods might be held invalid. The court of appeals noted that this was a well-founded fear, for a grandfather clause similar to Alabama's was struck down in *Guinn v. United States,* 238 U.S. 347 (1915), and Alabama's poll tax was held unconstitutional in *United States v. Alabama,* 252 F.Supp. 95 (M.D.Ala. 1966) (three-judge court). J.S. A-10, nn. 9 and 10.

The Alabama Constitution of 1901's suffrage article contained a temporary plan and a permanent plan. The temporary plan in Section 180 (to be used for 13 months after the ratification of the constitution) allowed enfranchisement based on (i) honorable service of the voter or one of his ancestors in the United States or Confederate armed forces (the "grand-

father clause"), or (2) the voter's good character and understanding of the duties and obligations of citizenship. "It was agreed that at least ninety-five percent of those registering under the soldiers and descendants clause would be white soldiers ***." McMillan, *Constitutional Development,* 287. The grandfather clause was placed in the temporary plan because of the fear throughout the state that white registration boards would not be fair to white men (as reported in Mississippi) in administering the good character and understanding clauses. III *Official Proceedings,* 2958, 3033.

The permanent plan in Section 181, effective in 1903, authorized the enfranchisement of any person (1) who could read and write and who had been regularly employed for most of the past 12 months or were physically incapacitated from doing one or the other, or (2) who owned (or whose wife owned) at least 40 acres or real or personal property assessed for taxation for three hundred dollars.

Section 182, the only section at issue here, applied under both the temporary and permanent plans.

The appellees, Victor Underwood and Carmen Edwards, challenged Section 182 of the Alabama Constitution which required disfranchisement for misdemeanors included either in a list of crimes or under the rubric of "involving moral turpitude." Both appellees had been affected by the operation of Section 182 because each had been convicted of uttering a worthless instrument (writing an insufficient funds check). Underwood had been purged from the roll of qualified electors by the Jefferson County Board of Registrars, and Edwards had not been allowed to register by the Montgomery County Board of Registrars.

Suit was filed in federal district court in 1978 against the registrars of Jefferson and Montgomery Counties. The plaintiffs and defendants were both certified as class representatives. J.S. D-2. Five causes of action were presented. The only claim ruled on by the court of appeals, and presented for review here, is the claim that section 182 was specifically adopted to disfran-

chise blacks on account of race and has had and continues to have that effect.[1]

SUMMARY OF ARGUMENT

The record presented to the district court established without contradiction that the Alabama Constitutional Convention of 1901 was convened for the purpose of reestablishing white supremacy. Both courts below so found, the expert witnesses for both the State of Alabama and the plaintiffs so testified, and they are in agreement with all historians who have published on the subject.

The convention adopted several suffrage provisions intended to effectuate the discriminatory purposes of the delegates. The provision at issue here disfranchises those convicted for the commission of certain misdemeanors. The plaintiffs did not question the authority of the State of Alabama to disfranchise for the commission of a crime, but only the discriminatory motivation for and result of the misdemeanors selected by the delegates to the 1901 convention and embodied in Section 182 of the State constitution.

The State's defense of this provision is *that although it admits Section 182 was intended to disfranchise blacks, the provision should not be held unconstitutional because there was also an intent to disfranchise poor whites.* The State makes no defense of the fact that discrimination aimed at *all* blacks and *some,* specifically poor, whites, remains discrimination in the

[1]The complaint also alleged that the fundamental right to vote on an equal basis with other citizens was being denied without a compelling state interest, that the disfranchisement provisions were a discriminatory denial of equal protection, and that the moral turpitude provision was vague and indefinite. The complaint was later amended to allege that the suffrage provisions of the 1901 Constitution violated the Act of Readmission, Act of 25 June 1868, ch. 70, 15 Stat. 74. The district court ruled against plaintiffs on all causes of action, and all were properly presented and argued to the court of appeals. Plaintiffs, appellees here, contend that the record supports their claims on all causes of action, and will rely upon all claims as alternative grounds if the case is remanded to the court of appeals.

elective franchise. With a leap of logic, the State merely does not view this as discrimination. Since the delegates to the 1901 convention were bent on establishing white supremacy of the conservative Democrats, the State defends the disfranchisement of blacks as "politically" motivated.

The district court found that while the motivation of the convention was to discriminate against blacks, Section 182 was not unconstitutional because there was no evidence that this particular provision was so intended. The court of appeals properly ruled this finding to be clearly erroneous. It found the record uncontradicted that Section 182 was intended to discriminate on the basis of race. It further found that the record in this case established that Section 182 had an overwhelmingly racially discriminatory effect in 1901 and at the time of trial.

The evidence shows that the misdemeanor clauses of Section 182 continue to have a disparate impact on blacks. The evidence in the record shows that Section 182's selective list of misdemeanors causes the disfranchisement of blacks at 1.7 or more times the rate for whites. J.S. A-11.

The district court also ruled that if there were any legitimate motivation for Section 182, its discriminatory motive would be of no consequence. The court of appeals, having ruled that plaintiffs had indeed established a *prima facie* case of the racially discriminatory purpose underlying Section 182, went on to apply the proper tests for determining the constitutionality of a provision alleged to discriminate on the basis of race in access to the elective franchise. Applying well-settled precedents of this Court, the court of appeals reviewed the provision with close constitutional scrutiny, requiring the State to demonstrate, in view of the *prima facie* proof of discrimination, that the provision was necessary to promote a compelling state interest, *Crawford v. Board of Education,* 458 U.S. 527 (1982), and to be the least drastic means available to achieve that interest, *Kramer v. Union Free School District,* 395 U.S. 621 (1969). It further required the State to establish by a preponderance of the evidence that it had a permissible motive in

adopting Section 182, *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1977), and that it would have done so even in the absence of the discriminatory motive. *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256 (1979).

Carefully reviewing the record in applying these tests, the court of appeals concluded that the State had not established that any reason other than invidious racial discrimination was the motivation for the adoption of Section 182, and reversed and remanded with directions.

ARGUMENT

This case presents a fairly simple point. The appellant registrars (hereafter referred to as "the State") argue that even though the 1901 Constitutional Convention adopted the petty crimes provision in Section 182 for the purpose of disfranchising substantially all blacks, the provision does not violate the Equal Protection Clause of the Fourteenth Amendment because there was also an intent to disfranchise poor whites. This dual motive does not alleviate the infirmity of the provision because the other motive itself is constitutionally invalid and under the well-settled precedents of this Court, the State failed to prove those elements necessary for even a legitimate motive to outweigh an admittedly racially discriminatory motive.

Section 182 is the last vestige of the discriminatory suffrage provisions of the 1901 Constitution of Alabama. The "grandfather clause" was effectually overturned by this Court's decision in *Guinn v. United States,* 238 U.S. 347 (1915). The poll tax was declared unconstitutional in *United States v. Alabama,* 252 F.Supp. 95 (M.D.Ala. 1966) (3-judge court), and the literacy, "understanding," and property ownership clauses were suspended by the Voting Rights Act of 1965, 42 U.S.C. §1973 *et seq.* This "long and sorry history of resistance to the Fifteenth Amendment's ringing proscription of racial discrimination in voting," *City of Richmond v. United States,* 422 U.S. 358, 379 (1975) (Brennan, J., dissenting) adopted by Alabama's disfranchising convention has lasted eighty-four years.

I. It is uncontradicted in this record that Section 182 was part of a set of invidiously discriminatory restrictions on suffrage. The court of appeals properly held that the district court finding that there was no discriminatory purpose was clearly erroneous.

The district court specifically held, "A major purpose of these conventions [in Southern states beginning in 1890] was to disenfranchise blacks," J.S. E-4, and held the same was true in Alabama: "The [Alabama] convention had met to establish 'white supremacy by law' and to overthrow the revolutionary methods of 'force and fraud used in Alabama since Reconstruction [to curtail black voting power] lest representative government perish in Alabama,'" *id.*, quoting McMillan, *Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism,* 267-8 (1955) (who was quoting the president of the convention).[2] Despite its finding of a discriminatory purpose for the whole convention, the district court held that the "intent as to the provision involved here has not been proven." J.S. E-7. This finding was clearly erroneous.

Historians who have published accounts of the suffrage features of the Alabama Constitution of 1901 agree that Section 182 was among the key features of the convention's successful effort to disfranchise black voters. All scholars recognize that many of the delegates of the 1901 convention also intended to disfranchise some poor whites as well. No one has ever disputed in a published work, however, that Section 182 and its companion suffrage provisions were primarily intended by the constitutional convention to eliminate as many black voters as possible.

The expert witnesses for both sides also agreed that some of the delegates to the 1901 convention intended to disfranchise blacks and some poor whites. J.S. 19, 30. The latter is not surprising for this was, after all, a convention controlled by the

[2]McMillan's work was cited at trial by both attorneys, both expert witnesses, and is cited by both the district court and appellate opinions. J.S. A-8, E-4.

Democratic Party, and it was poor whites who had left the Democratic Party to become the backbone of the Populist Party. J.A. 19. This intent to disfranchise poor whites became the sole evidentiary defense by the State for Section 182. Brief of Appellants, 9. Even this thin reed was destroyed by the State's own expert. In discussing the relative importance of the disfranchising all blacks and poor whites, the State's expert witness testified it was "the courting of [the black vote that] had represented the principal threat from the point of view of conservative white democrats ***." J.A. 19.[3]

The opening remarks of convention president John B. Knox set the tone for the convention:

> And what is it that we want to do? Why[,] it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.

I *Official Proceedings,* 8 (cited by the court of appeals, J.S. A-9). All historians agree that the Convention wanted to disfranchise blacks, but usually disguised its motive by resort to rhetoric.[4]

Sheldon Hackney describes the work of the suffrage committee that drafted the disfranchising provisions, including Section 182:

> It drew on the suffrage provisions of other Southern states, as well as many ordinances submitted by delegates, sent by constituents, and published by newspapers. Through the month of June the committee debated in private the suggestions of how best to disfranchise the Negro. Even without diabolical registrars, the constitution could eliminate Negroes by applying tests that took advantage of

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[3]"Since the [P]opulists were made up of predominantly poor whites and the Democratic party predominantly rich and conservative whites, the blacks became the block of votes that would decide which party's candidates got elected." Brief of Appellants, 14.

[4]The delegates often referred to, and distinguished between, the "ignorant and vicious" and the "intelligent and virtuous," J.A. 25 and McMillan at 269. Dr. Thornton, the State's expert witness, testified that these were code words for the desire to disfranchise practically all the blacks and lower class whites. J.A. 25.

> differing social conditions. Property tests, literacy tests, residence requirements, the poll tax, and disqualification for conviction of certain crimes all fell into this category.

Hackney, *Populism to Progressivism in Alabama,* 192 (1969) (footnotes omitted) (cited by the court of appeals, J.S. A-9).

The two expert witnesses — one called by each party — agreed that Section 182 had a discriminatory purpose. Dr. Thornton[5] (the State's expert) testified that "[t]he aim of the 1901 Constitutional Convention was to prevent the resurgence of Populism by disenfranchising practically all of the blacks and a large number of whites," J.A. 25; see also J.A. 27. Dr. Kousser[6] (the plaintiffs' expert) was more specific about the intent of Section 182. Dr. Kousser agreed with Dr. Thornton as to the purpose of the convention but also relied on the intent of the author of Section 182 (stated publicly when he introduced the provision) that he had written the section to disfranchise Negroes principally and disproportionately, J.A. 31.

The leading treatise on the 1901 Constitutional Convention, that of Malcolm C. McMillan, also concluded that Section 182 had a discriminatory purpose. The provision that became Section 182 was never a matter of controversy, McMillan explains, either in the committee or in the convention as a whole.

> Most of the proposals disqualified persons committing any one of a long list of petty as well as serious crimes which the Negro, and to a lesser extent the poor whites, most often committed. *** Most of the crimes contained in the report of the suffrage committee came from an ordinance by John Fielding Burns, a Black Belt planter. The crimes he listed were those he had taken cognizance of for years in his justice of the peace court in the Burnsville district, where nearly all his cases involved Negroes.

McMillan, *Constitutional Development,* 275 (cited by plaintiffs' expert, Kousser, J.A. 31, and the court of appeals, J.S. A-11).

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[5]Dr. J. Mills Thornton III is Professor of History of the South at the University of Michigan.

[6]Dr. J. Morgan Kousser is Professor of History and Social Science at the California Institute of Technology.

Many of the previous proposals had specified disfranchisement as a result of criminal convictions, and Burns incorporated these references in his own recommendation.[7] Burns began, however, with the following original suggestion: "Those who are bastards, or loafers who may be infected with any loathsome or contagious disease shall not be allowed to register, vote, or hold office." I *Official Proceedings,* 511. As Kousser testified, after citing this evidence, "It was, of course, common at the time for whites to think that those traits were predominant among blacks." J.A. 31. This wording was not incorporated into the final version of Section 182, but his second clause was adopted with only limited changes:

> 2. Those who shall have been convicted of treason, bribery, forgery, larceny, robbery, bigamy, seduction, incest, murder, rape, or any attempt to rape, arson, or an attempt to burn houses or property, burglary, or an attempt to burglarize, embezzlement, crime against nature, malfeasance or misfeasance in office, vagrancy, or obtaining money or goods under false pretense, who have not been pardoned and restored by the proper authorities.

I *Official Proceedings,* 511. Compare the final version of Section 182, *supra,* pp. 1-2.

The third clause in Burns' proposal would have disfranchised "Those who are descendants of parents, who are of or descendants of two or more different races." I *Official Proceedings,* 511. As adopted by the convention, Section 182 only disqualified those "convicted of *** miscegenation" rather than those of mixed race.

Although the development of Section 182 can be traced through the Convention records, there was little debate on this measure. There was more debate on other sections, such as the "fighting grandfather clause" or the literacy test; they were more controversial because of their application to whites. J.A. 29. But the expert witnesses for both sides agreed that the con-

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[7] I *Official Proceedings,* 114, 125-6, 129, 135, 150, 153, 161, 162, 198, 208, 219, 250, 275, 276, 301, 313, 330, 338, 340-41, 384, 389, 394, 424, 428, and 433.

vention record as a whole must be considered to determine the intent of the delegates on Section 182. J.A. 16, 29. They examined direct and indirect evidence. Kousser concluded, and the State's expert did not disagree:

> Most of the evidence as to the intentions of the framers of Section 182 is indirect, but all of it points in the same direction. The section was designed to have a racially discriminatory disproportionate impact on blacks, drafted by ingenious lawyers who were trying to circumvent the Fourteenth and Fifteenth Amendments while seeming not to violate their letter.

J.A. 32.

In one of the early scholarly studies of Southern disfranchisement, Paul Lewinson noted that Alabama's "petty crimes" provision was common throughout the region at the turn of the century. "The list of crimes involving disfranchisement diversified until it included petty larceny, wife-beating, and similar offenses peculiar to the Negro's low economic and social status." Lewinson, *Race, Class, and Party: A History of Negro Suffrage and White Politics in the South,* 81 (1932) (cited by Kousser, Kousser deposition at 9).

The use of criminal provisions in a racially discriminatory way as a disfranchising device had a long history in Alabama itself. The Constitution of 1875 disfranchised all persons convicted of larceny, among other crimes. One historian of the state argues that this was understood as a racial qualification:

> Another legal device that deprived many Negroes of the ballot was the inclusion of the word *larceny* in the disfranchising section of the 1875 Constitution. While previous constitutions had disfranchised anyone guilty of a penitentiary offense, such as *grand* larceny, the new Constitution was interpreted as withdrawing the ballot from those guilty of *petit* larceny.

Going, *Bourbon Democracy in Alabama, 1874-1890,* 34 (1951) (emphasis in original) (cited by Kousser, Kousser deposition at 10).

With this sort of tradition behind it, the racial implications of Section 182 of the Alabama Constitution of 1901 -- clear enough merely from an examination of the work of the convention that drafted it -- are made clear.

The list of crimes, as predicted, had a disproportionate impact on blacks. Dr. Thornton examined published reports of the number of inmates and found that 94% of the persons in county jails (misdemeanants) in 1901-2 were black. By comparing these figures with population statistics and registration figures before and after the adoption of the Constitution of 1901, Dr. Thornton concluded that 90% of the persons initially disfranchised by Section 182 were black, J.A. 25-6.

The case reviewed by the court of appeals thus contained substantial evidence presented by both sides that the purpose of Section 182 was to disfranchise blacks. There was no contrary evidence. For the district court to hold "intent as to the provision involved here has not been proven" is contrary to all the evidence. The court of appeals "on the entire evidence [was] left with the firm and definite impression of error by the court below with respect to the issue of intent." J.S. A-11; *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

II. Section 182 was properly held unconstitutional given its invidious racial intent, the uncontradicted evidence that it had and continues to have the intended racial effect, and the State's failure to establish any legitimate motive for its enactment.

The court of appeals held that the plaintiffs had to prove that Section 182 of the 1901 Constitution was adopted for the purpose of disfranchising large numbers of blacks in order to establish a violation of the Fourteenth Amendment, J.S. A-5. *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 66-7 (1980) (plurality opinion); *Washington v. Davis*, 426 U.S. 229, 240 (1976).[8] The plaintiffs met

[8]To hold that the existence of a permissible motive ends the inquiry would destroy several principles long embedded in our law; for example, that acts generally lawful may become unlawful when done to accomplish

this burden. The historical evidence supports this conclusion. Indeed, the State's own expert admitted as much. As the State's brief said in summarizing their expert testimony, "the entire suffrage article *had the intention to disenfranchise poor whites equally as well as blacks.*" Brief of Appellants, 11 (emphasis in original).[9]

This admission by the State establishes that part of the plaintiff-appellees' initial burden of proof to prove "that the decisionmaker *** selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

The court of appeals held that the proper inquiry, once discriminatory motive and impact have been shown, is stated by *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 271 n.21 (1977), and *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), J.S. A-5.[10] The inquiry then became, given the existence of the

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an unlawful end, *City of Richmond v. United States*, 422 U.S. 358, 379 (1975), and a constitutional power cannot be used to attain an unconstitutional result. *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1 (1910).

[9]The State repeatedly uses the word "equally" in referring to the intent of the 1901 Convention to disfranchise blacks and poor whites. The evidence does not support any contention that the disfranchisement of the two groups was "equal." The State's own expert testified that the number and proportion of blacks disfranchised by the 1901 Constitution was far greater than for whites. J.A. at 25-6. More importantly, State's brief concedes that "poor" whites, not all whites, were to be disfranchised, while *all* blacks, regardless of their economic status, were to be disfranchised. There was no intent to be "equal."

[10]In *Arlington Heights*, this Court held as follows:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.

429 U.S. at 271 n.21. In *Mt Healthy* this Court held that a school board, when dismissing a teacher for both valid and invalid reasons, must show as follows:

impermissible motive, whether the state authorities had proved by a preponderance of the evidence that any other motive both existed and would have led to the adoption of Section 182. The court also held that, given the proof of racial motivation and that this affected the elected franchise, the State was required to demonstrate that any permissible motive was

> compelling, *Crawford v. Board of Education*, 458 U.S. 527, 536 *** (1982), and the means employed must be precisely drawn to accomplish exactly the objective that the state purports to further. *Kramer v. Union Free School District*, 395 U.S. 621, 632 *** (1969).

J.S. A-5-6. The State has failed to do so in this case because it has failed to prove such permissible motives existed. The State bases its defense on the theory that any plausible argument will expiate the invidiously discriminatory intent of Section 182. The court of appeals properly rejected this argument.

The State argues that *Washington v. State*, 75 Ala. 582 (1884), provides a permissible motive for the adoption of Section 182. This argument is faulty for two reasons: First, no one mentioned *Washington v. State* in the suffrage debates of 1901, while schemes to disfranchise blacks were openly discussed. J.S. A-13 n.14. Second, the court of appeals noted that such a "good government" rationale is undercut by the omission of misdemeanors relatively more serious than writing a bad check – such as second degree manslaughter, assault on a police officer, assault and battery, mailing pornography, and aiding the escape of a misdemeanant. J.S. A-12 n.13.

The State also argues that Section 2 of the Fourteenth Amendment supports the adoption of Section 182.[11] Again

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> [T]he District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's employment even in the absence of the protected conduct.

429 U.S. at 287.

[11]The appellees do not agree that the Fourteenth Amendment's use of the term "other crime" includes misdemeanors. The same Congress which proposed the Fourteenth Amendment adopted the Reconstruction Act providing for reestablishment of civil government in the rebel states by

there is no evidence that this point was ever discussed at the Convention. In any case, while Section 2 allows the disfranchisement of those "less than twenty-one years of age" or within the class of those convicted for "participation in rebellion or other crime," it does not allow states to discriminate invidiously within those classes. Similarly, the Twenty-first Amendment permits the states to regulate the transportation, importation, and use of intoxicating liquors, but the Amendment provided no sanctuary for invidious gender-based discrimination. *Craig v. Boren*, 429 U.S. 190 (1976).[12]

The State argues that the Tenth Amendment leaves the states an unfettered hand in the regulation of the elective franchise, quoting a sentence from *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). Brief of Appellants, 29. *Kusper* did not so hold, and the sentence from that opinion immediately following the State's quote makes that clear: "[I]n exercising their powers of supervision over elections and in setting qualifications for

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conventions elected by adult males "except such as may be disenfranchised for participation in the rebellion or for felony at common law," Act of 2 March 1867, ch. 153, 14 Stat. 428, §5. The next two Congresses adopted a series of acts readmitting rebel states to the Union

> upon the following fundamental condition: That the Constitution of [the readmitted state] shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law •••.

Act of 22 June 1868, ch. 69, 15 Stat. 72; Act of 25 June 1868, ch. 70, 15 Stat. 73; Act of 26 January 1870, ch. 10, 16 Stat. 62; Act of 1 February 1870, ch. 12, 16 Stat. 63; Act of 23 February 1870, ch. 19, 16 Stat. 67; Act of 30 March 1870, ch. 39, 66 Stat. 80; Act of 15 July 1870, ch. 299, 16 Stat. 363. The use of the term "felony" in the readmission legislation suggests that the term "crimes" in the Fourteenth Amendment was similarly limited. Any other reading would mean Congress would be requiring suffrage for persons in state readmission conventions whom it would otherwise allow the states to disfranchise.

[12]In *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974), this Court held that Section 2 of the Fourteenth Amendment allowed the disfranchisement of all felons, but remanded for consideration of the "alternative contention that there was such a total lack of uniformity in county election officials' enforcement of the challenged state laws as to work a separate denial of equal protection •••."

voters, the States may not infringe upon basic constitutional protections." 414 U.S. at 57.

Finally, the State has argued throughout this case that the intention of the 1901 Convention was to disfranchise blacks and poor whites. Presumably, they are arguing that disfranchisement based on income or wealth is permissible — if not laudatory. Indeed, the 1901 Constitution explicitly discriminated against the poor. Section 181 (the permanent plan of suffrage) established two classes who could register: first, those who could read and write English and had been regularly engaged in work (with exceptions for those physically unable to do one or both); and second, the owner or husband of the owner of forty acres of land, or real or personal property assessed for three hundred dollars or more. To this explicit wealth-based classification was added an annual poll tax of one dollar fifty cents.[13]

The State must show that this anti-poor rationale met some compelling state interest. It has suggested none. The decisions of this Court in *Kramer v. Union Free School District*, 395 U.S. 621 (1969), and *Hill v. Stone*, 421 U.S. 289 (1975), have held that property-ownership requirements are not valid for enfranchisement in any general-purpose elections.

Beyond establishing the overwhelming disparate impact of Section 182 immediately after its adoption, appellees established the disparate impact in the four years prior to suit in Jefferson and Montgomery counties (which the district court held to be typical of the other counties when it certified their registrars as class representatives, J.S. D-2). The court of appeals found:

> In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as

[13]Since three-quarters of Alabama's families earned less than sixty-four dollars a year, the poll tax was a significant burden. Kousser, *The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of the One-Party South, 1880-1910*, 64 (1974). The tax was cumulative from year to year, so that the poll tax "pile[d] up so high that he [would] never be able to vote again," according to one delegate. McMillan, *Constitutional Development*, 300.

> whites to suffer disfranchisement under section 182 for the commission of nonprison offenses.

J.S. A-11. This sort of disparity requires something more in rebuttal than the vague homilies the State has offered about disfranchising immoral people. At no time has the State offered contrary evidence or even disputed the disparate impact of Section 182, historically or currently.

These results are more than an important starting point, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977); they strongly buttress the proof of intent to discriminate on the basis of race. They further demonstrate that Section 182 is not an historical remnant of no consequence. It has a continuing impact on black citizens of Alabama. It is continuing invidious racial discrimination of long standing.

Once an injury has been shown (injury such as restriction of speech or racially discriminatory impact), the burden shifts to the state to show (a) its valid interest (motive) and (b) the necessity of the means the State has chosen to implement its interest. The former must be "a compelling state interest" and the latter must be "the least restrictive means necessary." *Dunn v. Blumstein*, 405 U.S. 330, 336, 342, 353 (1972). Section 182 is a "state action that inhibits an individual's right to vote" and "must be tested by the strictest of constitutional standards," *City of Mobile v. Bolden*, 446 U.S. 55, 83-4 (1980) (Stevens, J., concurring); *see also, Rogers v. Lodge*, 458 U.S. 613, 630 (Powell, J., dissenting).

The existence of a compelling state interest is not a matter for conjecture or theory by the state's lawyers. It must be one actually held by the state as evidenced by an authoritative state body, either the legislature or the state court. In *Sherbert v. Verner*, 374 U.S. 398, 407 (1963), this Court refused to consider a rationale suggested for the first time on appeal by the state's attorneys because the state court had not expressed a view of this asserted state interest. *C.f., Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 470 (1981) (the purpose had been articulated by the state supreme court).

As noted above, the court of appeals found *no* evidence in the record that the Convention intended any "good government" reasons for the expansion of the list of disfranchising crimes. J.S. A-12. The State's failure to introduce any admissible evidence which would rebut the appellees' *prima facie* case of discriminatory motive supports the decision of the court of appeals.

CONCLUSION

The affirmance of the decision below will only prohibit the State of Alabama from discriminatorily disfranchising on the basis of misdemeanors. It will not stop disfranchisement for felonies, nor will it bar the State from adopting a nondiscriminatory provision for the disfranchisement of misdemeanants. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelly v. Kramer*, 334 U.S. 1, 22 (1948). The decision below should be affirmed because it is completely supported by the evidence and the law.

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